



State of New Jersey

OFFICE OF THE OMBUDSMAN FOR THE INSTITUTIONALIZED ELDERLY

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CHRIS CHRISTIE
Governor

JAMES W. MCCRACKEN
Ombudsman

KIM GUADAGNO
Lt. Governor

November 7, 2011

Dear Administrator:

As Ombudsman, I will write periodically to provide guidance to nursing facilities and skilled nursing facilities on topics that impact institutionalized elderly residents. Today, I am writing about the notice requirements when involuntary discharging and transferring a resident from a facility. I have seen many notices that do not comply with state and federal law, and I hope this letter will serve as a guide to drafting the required notices.

Notice Requirements for Transfer/Discharge of a Resident from a Nursing Facility

I. Content

Allowable Reason

The notice must provide a legally recognized reason for the involuntary transfer/discharge. Under federal law, there are only six such reasons:

- The transfer or discharge is necessary to meet the resident's welfare, and the resident's welfare cannot be met in the facility;
- The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- The safety of individuals in the facility is endangered;
- The health of individuals in the facility would otherwise be endangered;
- The resident has failed, after reasonable and appropriate notice, to pay (or to have paid under Medicaid or Medicare on the resident's behalf) for a stay at the facility; or
- The facility closes.

42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.12(a)(2).

The notice must specifically cite one of these reasons. Other justifications, such as behavioral problems or failure to follow facility policies, are not reasons under federal law.

Date

The notice must include the date when the transfer/discharge is to be carried out and generally must be issued at least 30 days prior to that date, unless the facility is closing. If facility closure is the reason cited, the notice must be issued at least 60 days prior to the proposed discharge/transfer date. Of course, some emergent circumstances may necessitate notice of less than 30 days, but notice should still be given as soon as practicable under the circumstances.

Destination of Resident

The notice must identify the location to which the resident will be transferred or discharged. This, too, must be specific. Vague language such as "to other facility" or "home" is not sufficient.

Contact Information for OOIE and Other Advocacy Organizations

The notice must include the name, telephone number, and address of OOIE.

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OOIE should at all times be represented as an advocacy organization that exists to assist residents. Thus, any language suggesting that OOIE is involved in the facility's decision to transfer/discharge a resident or will investigate residents or their families on behalf of facilities is improper (for example, "We are also sending this notice to OOIE for their investigative purposes." is inappropriate.).

If the resident has a developmental disability or a mental illness, the notice must also include the address and telephone number of the appropriate agency, which in New Jersey is:

Disability Rights New Jersey
210 South Broad Street, 3rd Floor
Trenton, New Jersey 08608
(609) 292-9742 or (800) 922-7233 in NJ Only
(609) 777-0187 (Fax)
(609) 633-7106 (TTY)
advocate@drnj.org

Appeals Information

Residents, regardless of payor source, have the right under federal law to appeal involuntary discharge/transfer notices to the State Medicaid agency. You must include contact information for the Fair Hearing Unit of the State Medicaid agency for this purpose.

Division of Medical Assistance and Health Services
Fair Hearing Unit
P.O. Box 712
Trenton, NJ 08625
(609) 588-2655

NOTE: Notices should never list OOIE as an appeals agency. OOIE has no involvement in facility decisions to involuntarily remove residents, nor does OOIE have a process for resident appeals. Again, OOIE contact information should be provided for resident advocacy purposes only.

II. Delivery of Notice

The notice must be given to the resident and an immediate family member or legal representative, if known. Many times, facility staff does not want to "upset" the resident and gives the notice only to the resident's family. This is not legally sufficient and, more importantly, does not alert the very person whose rights are impacted by the proposed transfer/discharge.

III. Medicaid and Medicaid-Pending Residents

If the resident is receiving Medicaid or awaiting a Medicaid determination, you must first contact your local Office of Community Choice Options (OCCO) for permission to relocate him or her. The Department of Health and Senior Service's regulations outlining that procedure can be found at N.J.A.C. 8:85-1.10. If OCCO grants its permission to transfer the resident, only then can you issue a 30-day notice to relocate the resident to another appropriate placement.

IV. Allegations of Financial Exploitation

You may sometimes seek to transfer or discharge a resident because the resident or his/her legal representative is not paying the bill and you believe something suspect may be happening with the resident's income or funds. If you suspect the resident has been or is being exploited, you are required by state law to report it independently to OOIE - as a "mandatory report." N.J.S.A. 52:27G-7.1(a). The sole fact that you are not receiving payment does not meet OOIE's definition of exploitation. See N.J.S.A. 52:27G-2(e). Please refer to the Ombudsman's Letter of March 15, 2011 for further guidance on this point.

I thank you for taking the time to read this letter. This letter is guidance only and is not legal advice. If you want legal advice or have questions about the content of this letter, you should contact your legal counsel.

I look forward to communicating with you about issues that are of concern to institutionalized elderly residents. I trust that if we work together on these issues, we can ensure that residents' rights are respected to the fullest extent possible.

Sincerely,



James W. McCracken
Ombudsman

c: Paul Langevin, HCANJ
Theresa Edelstein, NJHA
Michele Kent, LeadingAge NJ
Jennifer M. Halper, Esq., Disability Rights NJ
Robert Schwaneberg, Governor's Office
Mary O'Dowd, Commissioner, DHSS
Nancy Day, Acting Assistant Commissioner, DHSS—Division of Aging &
Community Services
Alison Gibson, Acting Assistant Commissioner, DHSS—Division of Health Facilities
Evaluation & Licensing
Leslie Sklar, DHS—Division of Medical Assistance & Health Services, Fair Housing Unit
Becky Kurtz, US Department of Health & Human Services, Administration on Aging